

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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KYLE FELLERS, ANTHONY FOOTE,
NICOLE FOOTE, AND ELDON RASH,

Plaintiffs.

v.

MARCY KELLEY, MICHAEL DESILETS,
MATT FISK, BOW SCHOOL DISTRICT,
PHILIP LAMY & STEVE ROSSETTI,

Defendants.

* * * * *

No. 1:24-cv-311-SM-AJ
November 22, 2024
1:20 p.m.

TRANSCRIPT OF EVIDENTIARY HEARING -DAY TWO
AFTERNOON SESSION
BEFORE THE HONORABLE STEVEN J. MCAULIFFE

APPEARANCES:

For the Plaintiffs:

Endel Kolde, Esq.
Brett Robert Nolan, Esq.
Nathan John Ristuccia, Esq.
Institute for Free Speech

Richard J. Lehmann, Esq.
Lehmann Major List PLLC

For the Defendants:

Marcy Kelley
Michael Desilets
Matthew Fisk
Philip Lamy
Bow School District

Brian J.S. Cullen, Esq.
Jonathan M. Shirley, Esq.
Cullen Collimore Shirley PLLC

For the Defendant

Steve Rossetti:

Dennis T. Ducharme, Esq.
Ducharme Resolutions PLLC

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Court Reporter:

Brenda K. Hancock, RMR, CRR
Official Court Reporter
United States District Court
55 Pleasant Street
Concord, NH 03301
(603) 225-1454

1		<u>I</u>	<u>N</u>	<u>D</u>	<u>E</u>	<u>X</u>	
2	<u>WITNESSES:</u>	<u>DIRECT</u>		<u>CROSS</u>		<u>REDIRECT</u>	<u>RECROSS</u>
3	<u>STEPHEN ROSSETTI</u>						
4	By Mr. Kolde	4					
5	By Mr. Ducharme			15			
6	<u>MATTHEW FISK</u>						
7	By Mr. Shirley	20					
8	By Mr. Kolde			26			
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P R O C E E D I N G S

THE CLERK: All rise for the Honorable Court.

THE COURT: Okay. Getting there, right?

MR. KOLDE: Ready to roll, your Honor.

THE COURT: All right.

MR. KOLDE: If I may proceed, your Honor, plaintiffs call Steve Rossetti.

THE COURT: Last witness?

MR. KOLDE: Last witness for us, yes, your Honor. We'll, obviously, want to cross whoever they call.

THE CLERK: If you would remain standing and raise your right hand.

STEPHEN ROSSETTI, having been duly sworn by the Clerk, was examined and testified as follows:

THE CLERK: Thank you. Please be seated, and please state your full name for the record.

THE WITNESS: Stephen Carl Rossetti.

DIRECT EXAMINATION

BY MR. KOLDE:

Q. Mr. Rossetti, we've never met, correct?

A. Yesterday.

Q. Oh. I shook your hand, right? And you live in Bow; is that right?

A. I do.

Q. And you are a soccer referee for youth soccer games,

1 correct?

2 A. Yes.

3 Q. When you referee for the Bow High School girls' varsity
4 soccer team, are you there as an employee of the School
5 District, some kind of sporting body, or are you an independent
6 contractor or something else?

7 A. As a referee, I'm an independent contractor.

8 Q. All right. But this September 17th game that we've been
9 talking about was an unusual game, is it fair to say?

10 A. No.

11 Q. Oh.

12 A. You're talking about the game, correct?

13 Q. I mean, you heard the question.

14 A. Okay. No, it wasn't unusual.

15 Q. Is it normal for you to get an email ahead of time from
16 the athletic director at the high school warning you about
17 potential problems that are anticipated at the game?

18 A. It is normal. I get them from all the athletic directors
19 in the state, because I am the assigner for all the games in
20 the state. So, it is normal to get emails and phone calls.

21 Q. For every game?

22 A. For a lot of games, when situations come up.

23 Q. For the September 17th game you got an email from
24 Desilets; is that correct?

25 A. I did.

1 Q. What did that email say?

2 A. That they were playing Plymouth, and Plymouth had a
3 transgender player, and they're going to have extra security at
4 the game.

5 Q. What else did the email say?

6 A. That's about it. It's all I can remember.

7 Q. What did that mean to you in terms of the actions you
8 would take?

9 A. None.

10 Q. At that point that you received the email from Mike
11 Desilets had you already assigned yourself to the game in
12 question?

13 A. I did. I already had, yes.

14 Q. Do you go out of your way to assign yourself to games
15 where you know Parker Tirrell is playing?

16 A. You know, I didn't know that person's name until
17 yesterday.

18 Q. Did you have awareness that there was a trans player
19 playing on the Plymouth team prior to September 17th and go out
20 of your way to assign yourself to games where you knew a trans
21 player was playing, regardless of whether you knew the player's
22 name?

23 A. Okay. I'm sorry. I don't understand the question.

24 Q. I'm just trying to ask you, do you try to ref the games
25 where you know a trans player is on the field?

1 A. Do I try to?

2 Q. Yes.

3 A. Well, I didn't know there was a trans player, transgender
4 player on the Plymouth team until the Thursday before, when I
5 was at Pembroke reffing the Plymouth game, and someone said,
6 There's a transgender player on the Plymouth team. That's when
7 I knew.

8 Q. And at that point had you already been assigned or
9 assigned yourself to the September 17th game?

10 A. I had already been assigned, yes.

11 Q. Is it fair to say that you knew there might be some kind
12 of an issue that the officials anticipated when you arrived to
13 referee the September 17th game?

14 A. You know, I wish I had known all the stuff from yesterday,
15 because I wouldn't have refereed that game. All those emails
16 and things that everybody was sending out and the, what do you
17 call it, social media that I don't look at, if I had known all
18 of that prior to I wouldn't have done the game.

19 Q. Why? Because it's not worth the hassle or some other
20 reason?

21 A. Not worth any hassle. There's enough hassle reffing the
22 game.

23 Q. Is it fair to say that you were on the lookout during the
24 game for some kind of a free-speech activity or demonstration
25 on the sidelines?

1 A. No.

2 Q. You heard Steve -- Mike Desilets, rather, testify about
3 your conversation with you in the middle of the field earlier,
4 correct?

5 A. Yes.

6 Q. All right. It sounds like there were two conversations,
7 one at the beginning of the stoppage and one at the end of the
8 stoppage, correct?

9 A. Yes.

10 Q. All right. Is it correct that you discussed with Mike
11 Desilets what to do about whether to resume the game or to
12 abandon the game?

13 A. Yes.

14 Q. And is it correct that you provided Mike Desilets options
15 for what you could do?

16 A. Well, it was two different conversations. In the second
17 one is when we talked about that.

18 Q. All right. So, let's talk about the first conversation,
19 and we don't need every detail, but basically what was talked
20 about on the first conversation?

21 A. Well, he came out and mentioned that there was a commotion
22 going on and that one of the people they were trying to get to
23 leave, and that's when I said to the players, Go to your
24 benches.

25 Q. And that was the conversation you had with him, correct?

1 A. Yes.

2 Q. All right. And did you guys talk about anything else at
3 that point? Did he tell you that it was about a pink wristband
4 with XX on it?

5 A. No, not that I remember.

6 Q. Had you seen the wristbands at that point?

7 A. No.

8 Q. You weren't even aware who was wearing the wristbands,
9 correct?

10 A. Yes, I was not.

11 Q. Just making sure, okay, that we understand the answer.
12 You were not aware, correct?

13 A. Correct.

14 Q. When you came over to the sideline and began addressing
15 Eldon Rash, you said something to the effect of, Is this the
16 person that's wearing the wristband?

17 A. You know, that's not really how it happened. Can I tell
18 you how it happened?

19 Q. Okay.

20 A. In a conversation with Mike Desilets he said that the
21 first person had left, but there's someone sitting at midfield
22 with a wristband on, and he won't take it off. Now, there had
23 been at least ten minutes go by, and, as a referee, we need to
24 do something to get this game going again, so I walked over and
25 said, as you could see in the clip, Why don't you take the

1 wristband off, or the game's going to be over.

2 Q. Did you, yourself, have any understanding of what the
3 meaning of the wristband was that Eldon Rash was wearing?

4 A. Absolutely not.

5 Q. Did you have any opinion about the wristband's meaning?

6 A. Absolutely not.

7 Q. Then, why did you say, You have no right to embarrass kids
8 like that?

9 A. I don't remember saying that.

10 Q. In the second conversation that you had on the field,
11 that's when you gave Mike Desilets options about stopping the
12 game, or abandoning the game, or figuring out what to do; is
13 that correct?

14 A. Yes. We talked about that, both of us, yeah.

15 Q. All right. He described the options that you provided,
16 and I just want to hear you say it in your own words. What
17 were the options you provided to Mike Desilets in that second
18 conversation on the field after you had spoken to Mr. Rash and
19 directed him to remove the wristband?

20 A. I told him that, Where there's 23 minutes left in the
21 game, and in New Hampshire high school soccer it's a legal
22 game, we can just leave, and he said, Why don't we just wait a
23 little bit longer, and within a couple of minutes he got a
24 walkie-talkie and he said to me that the person took his
25 wristband off, so we restarted the game.

1 Q. Did Mike Desilets tell you in either of the conversations
2 that it was essential for both schools to have that wristband
3 removed before the gameplay was resumed?

4 A. No.

5 Q. Then, why did you walk over to ask Eldon Rash or to tell
6 him that the game was over if he didn't remove the wristband?

7 A. Mike said, We have one person left wearing a wristband,
8 and I wanted to get the game restarted, so I walked over and
9 told him, Why don't you take it off.

10 Q. I know, but there's no rule against wearing wristbands at
11 youth soccer games, so, Mr. Rossetti, please explain to us, if
12 you didn't know what the wristbands meant --

13 THE COURT: I understand. There's no jury. No
14 objection is necessary.

15 Q. -- why did you ask him to remove the wristband? Why did
16 you care?

17 A. I really didn't care, but it didn't look like the game was
18 going to start unless he took it off. That was my impression.

19 Q. And the reason the game wasn't going to start was because
20 Mike Desilets asked you not to restart the game until after the
21 wristband was taken off?

22 A. Mike just said, There's one person still wearing a
23 wristband.

24 Q. Why did you care?

25 A. Well, I really don't care, but I wanted to get the game

1 started, so I went over.

2 Q. I mean, you were the one deciding whether the game started
3 or not, right, so why did you care whether he was wearing the
4 wristband?

5 A. Because Mike said, There's one guy still wearing a
6 wristband.

7 Q. I understand Mike said that. So, were you taking
8 directions from Mike about whether to restart the game, then?

9 A. No. We were just talking about what was going on.

10 Q. Okay. So, do you have any explanation for why it mattered
11 to you that Eldon Rash was still wearing a wristband, why that
12 was necessary for him to remove the wristband before you
13 restarted the game? That's what you said, right?

14 A. Right. I did say that.

15 Q. Why did you say that?

16 A. Because it seemed to be that was what Mike Desilets
17 wanted. He wanted it off.

18 Q. If any of the school officials on the sidelines told my
19 client, Eldon Rash, that the game would be forfeited if it
20 didn't resume and could cost the Bow girls' team a playoff
21 spot, would that have been inaccurate?

22 A. Yes.

23 Q. Because of the rule that you explained earlier, that, if
24 you're in the second half and the game is abandoned, it's
25 completed with the score to that point; is that correct?

1 A. Yes.

2 Q. When you spoke to Eldon Rash and said something to the
3 effect of, The wristband comes off or this game is over, you
4 said that because you wanted him to remove the wristband; is
5 that correct?

6 A. I wanted to restart the game.

7 Q. Yeah, but you said that because you wanted him to remove
8 the wristband so you could restart the game; is that correct?

9 A. Yes.

10 Q. You heard testimony about what happened out on the parking
11 lot after the game. Do you think you could have handled any of
12 that a little better?

13 A. Absolutely.

14 Q. In what way?

15 A. Well, first of all, you don't have the whole story of what
16 happened out there. I was provoked, and that's never been
17 brought up.

18 Q. Okay. I don't think we need to get into a ton of detail
19 on that, but in what way were you provoked to swearing at my
20 client?

21 A. Okay. My partner and I went walking out towards our car,
22 and I can't believe that there's some guy there holding a sign
23 next to my car, and I'm going, How does he know where my car
24 is? And then I go -- then I realize, No, he doesn't know it's
25 my car; he's just there for some other reason. Oh, was the

1 Plymouth school bus right there? Yes, it was. So, he's
2 eyeballing us, trying to stare us down, nodding his head at us,
3 and my partner gets into it with him, and I said, Don't talk to
4 that asshole. And then we started to take our shirts off and
5 get ready to leave, and he provoked me into getting into a
6 banter with him, and I ended up saying and called him a fuckin'
7 asshole.

8 Q. And the reason you called him that is because you
9 disagreed with the pink wristbands with XX on it, correct?

10 A. You know, I don't even know what those wristbands were
11 until I came here.

12 Q. And you disagreed with the sign that he was displaying out
13 in the parking lot?

14 A. I didn't even know what the sign said, but he's holding up
15 a sign. I found out what the sign said here.

16 Q. Then why did you call him an asshole?

17 A. You know, just an adjective.

18 Q. I think I'm almost down here, Mr. Rossetti.

19 Why, if you didn't care what my client was saying, why
20 did you roll down your window and say to him, Your daughter is
21 going to hate you in 20 years?

22 A. I did say that.

23 Q. How come?

24 A. Because he had provoked me, and I was upset.

25 Q. His daughter's going to hate her dad because he provoked

1 some ref?

2 A. You know, I don't know where it came from, but it came.

3 MR. KOLDE: Nothing further.

4 THE COURT: Mr. Cullen, or do you want to go with
5 Mr. Ducharme first? It's your witness or your client.

6 CROSS-EXAMINATION

7 BY MR. DUCHARME:

8 Q. Mr. Rossetti, are you a political person?

9 A. No.

10 Q. Are you a social media person?

11 A. No.

12 Q. Do you take positions on issues in public?

13 A. No.

14 Q. How long have you been a ref?

15 A. Fifty-three years.

16 Q. How many sports?

17 A. Three.

18 Q. About how many games do you do a year between the three
19 sports you do or have done?

20 A. About 170.

21 Q. For 53 years?

22 A. Mm-hmm.

23 Q. So, thousands and thousands of games?

24 A. Mm-hmm.

25 Q. Okay. Try to say "Yes."

1 A. Yes. I'm sorry.

2 Q. That's okay. Real quickly, because I don't think the
3 Court really cares about any of this right now, what's game
4 management?

5 A. Making sure that the rules are enforced and the players
6 are protected. Oh, game management at a certain field, it's
7 usually the athletic director, and if there's no athletic
8 director they usually have a teacher there taking their place,
9 and if there's neither it's usually the home coach.

10 Q. And what's the interplay between game management and the
11 on-field or on-court officials?

12 A. Well, before the game we always check in with game
13 management and ask them how things are and what's going on and,
14 Anything special going to happen today?

15 Q. And in this case you did get the email?

16 A. Mm-hmm.

17 Q. Yes?

18 A. Yes.

19 Q. And you knew there could be some sort of activity going
20 on?

21 A. Yes.

22 Q. Okay. What caught your attention that day? We've seen
23 the video, but what caught your attention?

24 A. I was on the fan side and going back -- up and down, and I
25 heard a commotion going on, which is hard for me, because I'm

1 focused on the game, but I heard a commotion that was loud
2 enough for me to look, and in the video you can see that I
3 look, and I saw the police officer being animated with a
4 person, and I'm going -- I went to myself, You know what? This
5 isn't good for the players. So, next chance I had, dead ball,
6 I stopped the game, went over to midfield to talk to my
7 partner, and that's when Mike came out and told me what was
8 going on.

9 Q. So, that's the lead-up to everything we saw on the
10 bodycam?

11 A. Yes.

12 Q. And I think you've been pretty clear up until this all
13 sort of blew up you didn't know what these wristbands were all
14 about.

15 A. I did not know.

16 Q. Did you care what the cause of the commotion with the
17 police officer was?

18 A. No.

19 Q. Have you had to stop games during your career before
20 because of a commotion in the stands, a fight in the stands?

21 A. Yes.

22 Q. Is it a frequent thing, a once-in-a-while thing?

23 A. Once in a while.

24 Q. In terms of the interaction that's been described by
25 Mr. Desilets and that we saw on the video, is how this shook

1 out with you and him as game management any different than
2 you've had happen at other games?

3 A. No, not at all. It was good.

4 Q. And, ultimately, is it fair to say that you're the guy who
5 made the call to stop the game?

6 A. Yes.

7 Q. But from thereon you're working, and he wants that
8 wristband off, right?

9 A. Yes.

10 Q. Do you care why he wants it off?

11 A. No.

12 Q. And you know that the wristband has something to do with
13 the police presence and the commotion?

14 A. Yes.

15 Q. Okay. When did you assign yourself this game, this
16 September 17th game?

17 A. In July.

18 Q. You're assigning basketball right now?

19 A. Yes.

20 Q. What months are you assigning for basketball now?

21 A. Right now I'm in February.

22 Q. Mr. Kolde asked you some questions about you picking and
23 choosing and assigning yourself for games with trans athletes
24 in them? Is that --

25 A. No.

1 Q. -- anything you've ever thought of doing?

2 A. No, no.

3 Q. Why did you assign yourself to this game back in July?

4 A. Back in July I assigned myself to this game because Bow is
5 a very good team, and in past years Plymouth hasn't been very
6 competitive, and after reffing 53 years doing a
7 less-competitive game is a good thing to do for an old man like
8 me.

9 MR. DUCHARME: That's all I have, sir.

10 THE COURT: Mr. Cullen?

11 MR. SHIRLEY: It will be me, and no questions, your
12 Honor.

13 MR. CULLEN: I'm sorry, your Honor.

14 THE COURT: Mr. Shirley, no questions.

15 No redirect, I assume.

16 Thank you, sir. You may step down. You're excused as
17 a witness in this case.

18 (Witness stepped down)

19 THE COURT: And next witness.

20 MR. KOLDE: We're done with our part, your Honor.

21 THE COURT: Excellent.

22 Mr. Shirley.

23 MR. SHIRLEY: We're going to call Matt Fisk, your
24 Honor, as our potentially only witness.

25 THE CLERK: Please remain standing and raise your

1 right hand.

2 **MATTHEW FISK**, having been duly sworn by the Clerk, was
3 examined and testified as follows:

4 THE CLERK: Thank you. Please be seated. Please
5 state your full name for the record.

6 THE WITNESS: Matthew Fisk.

7 DIRECT EXAMINATION

8 BY MR. SHIRLEY:

9 Q. No e?

10 A. No e, just like Carlton.

11 Q. Would you describe your position with Bow High School?

12 A. I am the principal of Bow High School.

13 Q. How long have you been principal?

14 A. I became principal on July 1st of this year.

15 Q. And have you been with Bow before that?

16 A. Yes. For five years I was the assistant principal.

17 Q. Did you have any role before being assistant principal
18 with Bow?

19 A. No.

20 Q. What's your background before that, teacher?

21 A. Yes. I began my career teaching social studies at Concord
22 High School. I then went to New Hampton school, a prep school
23 in the Lakes Region, where I taught social studies, and then
24 for the last six years of my tenure there I was the academic
25 dean. I also coached both boys' and girls' varsity cross

1 country.

2 Q. Where did you grow up?

3 A. Right here in Concord.

4 Q. Are there gay students at Bow High School?

5 A. Yes.

6 Q. Are there transgender students at Bow High School?

7 A. Yes.

8 Q. What is GSA?

9 A. GSA stands for Gay-Straight Alliance.

10 Q. What is it?

11 A. The Gay-Straight Alliance is an extracurricular club that
12 the school offers.

13 Q. Who attends a Gay-Straight Alliance club meeting?

14 A. The club is open to any Bow High School student.

15 Q. Where do the meetings take place?

16 A. They vary, but this year they're taking place in one of
17 the special education teacher's classrooms.

18 Q. What time of day?

19 A. Either before or after school.

20 Q. Do you have a capacity with respect to that organization?

21 A. I do.

22 Q. What is that?

23 A. For the past two years I've been helping to advise that
24 group.

25 Q. Can you just fill in what would that -- when you're doing

1 that job or that role what is called upon? What are you called
2 upon to do?

3 A. If the students want to watch a film, I help arrange a
4 space for them to be able to do so. We have a club fair at the
5 beginning of the year, so I work with the student leaders in
6 the club to help organize posters, so as part of the fair that
7 we set up outside the school with the other clubs, so they can
8 find interested students, and then handle logistical things
9 that come up.

10 Q. In your capacity as both principal and assistant principal
11 before that and in this advisory role have you come to
12 understand some of the issues that transgender students
13 struggle with?

14 A. Yes.

15 Q. Can you describe to the Court your experiences with that?

16 A. Sure. We have several transgender students who I have
17 talked with over the tenure at Bow High School. I know that,
18 just like every student struggles, trans students suffer from a
19 higher rate of suicide and depression than other high school
20 students. In direct conversation with some of these kids
21 they've shared heartbreaking stories about some of the things
22 that they've experienced.

23 MR. KOLDE: Your Honor, I am going to just note an
24 objection that this is hearsay testimony about unidentified
25 students.

1 THE COURT: Objection overruled.

2 MR. SHIRLEY: Thank you.

3 Q. Continue.

4 A. I can think of one specific student who I've talked with
5 for the entirety of their time at Bow High School who has been
6 hospitalized for self-harm, and a leading cause of that is some
7 of the stress that this child feels from peers and society.

8 Q. Thank you. Shifting a little bit of the focus now, let's
9 talk just quickly about speech issues that you confront.

10 A. Yes.

11 Q. Do you have moments in time where you have to address
12 speech issues in the school setting?

13 A. Yes.

14 Q. Can you give me an example of something that would be --
15 where you've been involved?

16 A. I mean, a basic one, if I'm walking the halls and I hear a
17 student swear, I'll tend to say, Watch your language.

18 Q. Yeah.

19 A. Right.

20 Q. Any issues about race, sex, gender, any of these issues
21 that you have had to intervene with students on?

22 A. Yes.

23 Q. Okay. Confederate flag, perhaps? Is that an issue you've
24 had to be involved in?

25 A. Yes. Approximately four years ago -- we have gmail as our

1 email system, and you can have, like, your picture be your
2 background there. One of the students had a Confederate flag,
3 so I'm a social studies teacher, so I brought him into my
4 office and asked him what was the message that he was intending
5 to send. And he said, you know, I'm against -- I'm against
6 government. And so, I talked to him about the symbol for many
7 people has come to have really racist undertones, and so we
8 talked about other symbols he could use, and he decided to
9 change the symbol to the Don't Tread on Me flag.

10 Q. How about the parking lot? Does any old symbol just come
11 walk into that parking lot or drive into that parking lot? Do
12 you have no concerns about that?

13 A. Prior to my arriving at Bow High School the principal did
14 deal with a truck that was flying the Confederate flag around
15 the parking lot, and he asked the student to take it down.

16 Q. There was testimony earlier today about words you spoke to
17 Eldon Rash. I'm now jumping way ahead, right to the September
18 17th game, in the middle of the game, and we saw some video
19 clips. There's you, in terms of I'm speaking of the video,
20 talking to Mr. Rash, and I believe he testified today that you
21 told him specifically that the game would be forfeited if he
22 did not remove that wristband.

23 Do you remember that testimony today?

24 A. I remember it, yes.

25 Q. Can you describe what you said to Mr. Rash?

1 A. At various points I said, Sir, could you please remove the
2 wristband that you're wearing. I think I said "please" a
3 number of times. I believe almost every time I addressed him I
4 addressed him as, Sir, could you please remove the wristband.
5 I did hear on the video somebody talk about the game being
6 forfeited. That was not me. I recognize the voice. It wasn't
7 me.

8 Q. Did you threaten that something bad would happen to his
9 granddaughter if he did not comply to your requests?

10 A. No.

11 Q. Let's just quickly, in your words, what is the problem
12 with this wristband or these wristbands on that day?

13 A. On that day there was a transgender child playing for the
14 Plymouth soccer team. We -- I believe that as an anti-trans
15 symbol, and, as such, did not want to subject the child to
16 intimidation or threats of harm, especially knowing what I do
17 about the challenges that trans kids go through.

18 Q. Did you have concerns that there was something else that
19 might happen beyond wristbands that day?

20 A. Yes.

21 Q. Okay. What basis did you have to believe that anything
22 more than wristbands was afoot?

23 A. I had also read the same emails that have been shared
24 here. At approximately 1:30 I received a phone call from a
25 parent who basically reiterated the exact same things that were

1 in the email. So, I had seen emails talking about possible
2 demonstrations, and I received a phone call about a possible
3 demonstration.

4 MR. SHIRLEY: Thank you.

5 THE COURT: Thank you, Mr. Shirley.

6 Why don't we go Mr. Kolde and Mr. Ducharme.

7 CROSS-EXAMINATION

8 BY MR. KOLDE:

9 Q. Mr. Fisk, do you consider yourself to be a trans ally?

10 A. Yes.

11 Q. You testified about your experience dealing with students
12 that were transitioning. Were those students medically
13 transitioning, or socially transitioning, or both?

14 A. Both.

15 Q. Do you support gender-affirming care in your role as a
16 principal?

17 A. I have no opinion on that.

18 Q. I'm sorry. I couldn't hear you.

19 A. I have no opinion on that. My apologies.

20 Q. Do you, in your role as advisor to the Gay-Straight
21 Alliance, do you have any knowledge about what the term
22 "misgendering" means?

23 A. I was familiar with that term prior to my arrival in Bow.

24 Q. Okay. And what does -- for those -- for the Court's
25 edification, the Court may know, but what does "misgendering"

1 mean?

2 A. My understanding is, if a student identifies as male,
3 somebody referring to them as female.

4 Q. Does that include using the person's dead name? Is that
5 also a form of misgendering?

6 A. I suppose so, but I think it also depends on the intent.

7 Q. What is a dead name?

8 A. A dead name is for a student who has transitioned from one
9 sex to the other oftentimes has a name change, and so that
10 would be using the name that they transitioned from.

11 Q. Do you believe that it is wrong for citizens to engage in
12 misgendering a trans student?

13 A. I believe if it's done on purpose, yes.

14 Q. And my question wasn't whether it was done on purpose. My
15 question is do you believe it's wrong?

16 THE COURT: Wrong in what sense? Legally wrong,
17 morally wrong, socially wrong, politically wrong? What?

18 MR. KOLDE: All of the above.

19 THE COURT: Well, no. It's totally irrelevant.

20 MR. KOLDE: Well, it goes to his viewpoint in wanting
21 to censor the --

22 THE COURT: Objection sustained.

23 Q. Sexual orientation is different than gender identity,
24 right?

25 A. Correct.

1 Q. You understand, in your role as an advisor, that there are
2 many gay people who disagree with transitioning, correct?

3 A. I know that it's a -- yes.

4 Q. There are some gay people that think that the trans
5 community is preying on confused gay students, correct?

6 A. Yes.

7 Q. Do you disagree with that view?

8 A. Which view, sir?

9 Q. That view, that some in the trans community prey on
10 confused gay students.

11 A. I have no problem with prayer.

12 Q. I misunderstood your answer.

13 A. I have no problem with prayer.

14 Q. Prey, prey. No. Prey. That they are --

15 THE COURT: P-r-e-y.

16 MR. KOLDE: Yes.

17 Q. Yes?

18 A. Oh, oh.

19 Q. Yeah. I don't think you're pro preying, I hope, in that
20 sense, p-r-e-y.

21 A. Okay. Thank you for the clarification. I would disagree.

22 Q. I thought you would.

23 You talked a little bit about the parking lot, and you
24 testified about a student that was displaying a Confederate
25 flag on their vehicle; is that right?

1 A. Correct.

2 Q. And was it a bumper sticker?

3 A. It was a flag on a pole.

4 Q. Like, a huge one or one of those little ones that sticks
5 out of your window?

6 A. Approximately, what's this (indicating), like 3 by 5?

7 Q. I see. Okay.

8 A. On a pole.

9 Q. But you would agree that you don't make an effort to
10 patrol what parents put on their cars normally, do you?

11 A. If I saw something offensive, I would take action on it,
12 yes.

13 Q. Okay. You saw some photographs in this case of vehicles
14 parked on Bow School District property with pride flags on
15 them. You don't have a problem with that, correct?

16 A. No. Neither did I with Trump flags that were also
17 positioned, or Harris bumper stickers, or Kelly Ayotte bumper
18 stickers, or whatever.

19 Q. All right. So, let's orient it towards the issue in this
20 case. What if tomorrow somebody parked a car with a bright
21 pink bumper sticker and two black Xs on it visible in the Bow
22 High School parking lot. Would you have a problem with that?

23 A. I would address the issue, and how I would address it
24 would depend on if it were a visitor to our school, if it were
25 a student who parked their car in our parking lot, if it were a

1 parent. So, context would matter, but, yes, I would address
2 it.

3 Q. So, if it was a parent, how would you address it?

4 A. I would give them a phone call and ask them to come in and
5 talk to me and tell them what the symbol had come to represent
6 and ask that they don't come to our school with that displayed
7 on their vehicle.

8 Q. And why would you do that?

9 A. Because schools should be places of education, where
10 students are able to learn in an environment in which they're
11 able to take risks, and I don't think you can do that if you
12 are in a parking lot and you're walking into the school and you
13 see signs that you're not wanted, that you don't feel -- that
14 you feel like you should be excluded, that there's something
15 wrong with you. I don't think that's helpful for any student.

16 Q. Just briefly, I want to explore this, and then I'll be
17 done, I promise. You must realize, Mr. Fisk, that there are
18 millions of Americans that don't believe you can change your
19 sex based on your beliefs about gender. You understand that,
20 correct?

21 A. Yes.

22 Q. And you also understand that transgender students must
23 have some awareness that some people disagree on this issue of
24 gender identity and changing your sex and those trans issues,
25 correct?

1 A. I know that they do, yes.

2 Q. And you just talked about the Bow schools being a place of
3 learning. Shouldn't you be able to talk about that
4 disagreement, which is very real, without banning the viewpoint
5 or the expression of the viewpoint?

6 A. Again, I think it matters the context. If we're talking
7 about a legal case, right, if this were a civics classroom, and
8 the cases that have come up, Title IX cases come up, I think it
9 would be entirely appropriate to have that conversation in the
10 course of a classroom. I don't think it's ever appropriate to
11 show symbols that are regarded as hateful in a class, period.

12 Q. And you regard the pink field with the black XX on it as a
13 hateful symbol; is that correct?

14 A. Yes.

15 Q. And you regard it as inappropriate to display anywhere on
16 Bow School District property or at a Bow School District event;
17 is that correct?

18 A. Correct, sir.

19 MR. KOLDE: Nothing, your Honor.

20 THE COURT: All right. Thank you.

21 Mr. Shirley?

22 MR. SHIRLEY: Nothing, your Honor.

23 MR. CULLEN: Nothing, your Honor.

24 THE COURT: Great. Thank you.

25 You may step down, Mr. Fisk, and you're excused as a

1 witness. Appreciate it.

2 (Witness stepped down)

3 MR. SHIRLEY: Your Honor, one proffer. We have a --
4 excuse me -- we have a Mr. Brian Murphy. He's actually the
5 stepson of Mr. Rossetti. He was the other ref. The proffer
6 would be --

7 THE COURT: I'm not sure what --

8 MR. SHIRLEY: And that's why we're asking.

9 THE COURT: What role does Mr. Murphy have in this
10 case? Why is he here?

11 MR. SHIRLEY: Merely, he would testify to the fact
12 that, when he was exiting from the field to the parking lot,
13 which was near Mr. Rossetti, he witnessed Mr. Fellers --

14 THE COURT: I'm asking a more fundamental question.
15 Why is he here? Are we with done with Mr. Rossetti? Is there
16 some theory that he conspired with the Bow administrators to
17 make these wristbands be removed because he's anti-anti-trans
18 or something?

19 MR. KOLDE: Correct, correct.

20 THE COURT: There's not much to that theory, is there?

21 MR. KOLDE: No, I think there is, but it may not be
22 relevant, ultimately, for the Court making the decision here,
23 because it's very clear what the Bow School District thinks
24 about it. But, yeah.

25 THE COURT: We agree it's got nothing to do with the

1 preliminary injunction.

2 MR. KOLDE: I didn't say "nothing."

3 THE COURT: Well, tell me what it does have to do with
4 the preliminary injunction, then.

5 MR. KOLDE: Well, because I think that it was --
6 because they utilized him to be able to -- he was following the
7 directives of the Bow School District to get my client --

8 THE COURT: You understand conspiracy requires an
9 agreement --

10 MR. KOLDE: Judge, you're not letting me answer.

11 THE COURT: -- unlawful objective with the specific
12 intent to achieve the unlawful objective. You understand that,
13 right? Right?

14 MR. KOLDE: I'm sorry, your Honor. I didn't
15 understand the question. Could you repeat it, please?

16 THE COURT: Yes. I don't understand why Mr. Rossetti
17 is involved in the case, and I thought you said, Well, he does
18 have something to do with the preliminary injunction hearing.
19 What is that, because I don't see it?

20 MR. KOLDE: I was trying to answer, but you began
21 speaking over me, so if I could answer --

22 THE COURT: Well, that happens with judges sometimes.

23 MR. KOLDE: It does.

24 THE COURT: Lawyers just put up with it. It's part of
25 the deal.

1 MR. KOLDE: All right.

2 THE COURT: Okay. They don't complain about it,
3 usually. But go ahead.

4 MR. KOLDE: Not the first time.

5 But, in any event, your Honor, the issue is that my
6 clients were censored in this game. Part of the censorship was
7 done directly by the Bow School District officials, and some of
8 that censorship was aided and abetted by Mr. Rossetti,
9 including what we saw happen on the field in the video.

10 THE COURT: But he has to have a conscious intent to
11 do that, and there's no evidence of that.

12 MR. KOLDE: He said, You have no right to embarrass
13 kids. He said --

14 THE COURT: That was afterwards.

15 MR. KOLDE: No. He said that -- it's on the video,
16 and I understand the Court has only seen the video once so far,
17 but I would encourage the Court later to take another look. On
18 the field, when he's talking to Eldon Rash, he says, You have
19 no right to embarrass kids. That's when he's on the field.
20 Mr. Rossetti testified, I don't remember saying that. He
21 clearly said that, and the reason he said that is because he
22 disagreed with Eldon Rash.

23 THE COURT: Doesn't this turn -- isn't this a legal
24 issue that turns on the nature of, the limited public nature of
25 the forum and whether or not the person or the persons

1 operating that forum can restrict speech within that forum and
2 whether or not they did restrict the speech, which they did,
3 and whether or not that restriction is allowed under the First
4 Amendment?

5 MR. KOLDE: Mostly, yes. We mostly agree with that.

6 THE COURT: Well, entirely. That's certainly what the
7 preliminary injunction is involved with. That's it, right?

8 MR. KOLDE: I think the distance --

9 THE COURT: So, Mr. Rossetti plays no role.

10 MR. KOLDE: The distance between you and I on this,
11 your Honor, is I would say he plays a small role, you would say
12 he plays no role, but we agree that his role is not large.

13 THE COURT: Okay. File an appropriate motion at an
14 appropriate time. Mr. Ducharme will deal with it.

15 MR. DUCHARME: And it has been my intention from my
16 first effort to talk with Mr. Kolde, which he doesn't like to
17 do.

18 THE COURT: Okay. Well, we'll take care of it that
19 way. We've got to slim this case up to what's relevant and
20 important.

21 MR. SHIRLEY: Sorry. If I may -- you're gathering
22 your papers -- I do have one small question for the Court.

23 THE COURT: I thought you were done.

24 MR. SHIRLEY: Almost, almost. There's just this very
25 narrow issue. There's this question about what happened after

1 the game breaks and there's Mr. Fellers with his sign. We've
2 asserted that he was facing the bus with what we believe was an
3 intention to show the sign to the exiting Plymouth bus. I have
4 Mr. Brian Murphy here. He is the stepson of Mr. Rossetti. He
5 was the other ref on the field. He will, if put on the stand,
6 would testify that as he was exiting he saw Mr. Fellers facing
7 with his sign in the direction of the bus, which he estimated
8 to be about 30 to 50 feet away, and that that's what he
9 witnessed.

10 THE COURT: Well, again, as I hear the evidence, Bow
11 doesn't allow the brandishing of signs on its property during
12 extracurricular school events, whatever they say.

13 MR. SHIRLEY: And it is merely to say what followed
14 after Mr. Murphy's, what he perceived --

15 THE COURT: No, but my point is, is that part of this
16 case? You can't have a sign. That's not viewpoint
17 discriminatory. That's no-sign discriminatory.

18 MR. SHIRLEY: And I wasn't sure what's hanging out
19 there with regard to what happened with Mr. Fellers when he's
20 approached by the police, because he's asked to leave. That's
21 that whole second video the Court --

22 THE COURT: Once again, that has nothing to do with
23 operating a limited public forum and restricting speech within
24 that forum and the purpose for restricting it.

25 MR. SHIRLEY: And you answered my question, which is,

1 it doesn't sound like you particularly care to know or have
2 Mr. Murphy go on the stand for that, which is fine.

3 THE COURT: I'm happy to hear it, if you think it's
4 material evidence, but what is it material to?

5 MR. SHIRLEY: And I'm going to say I don't think it
6 sounds like it is material, your Honor, so we're not going to
7 call him, and I think at that point we're done.

8 THE COURT: Did we set a briefing schedule, or did you
9 want to just have oral argument? Did we set it, or did we say
10 we were going to set it?

11 MR. KOLDE: We did set a briefing schedule, your
12 Honor, and I did have a motion that I wanted to make,
13 preliminarily, if I could, briefly.

14 THE COURT: Sure.

15 MR. KOLDE: I believe the post-hearing briefs are due
16 December 13th, I'm welcome to be corrected by any of my
17 co-counsel, that are going to be filed simultaneously --

18 THE COURT: I'd welcome them earlier, by the way. No
19 requirement, but earlier is good, too.

20 MR. KOLDE: Yeah, with optional reply briefs due a
21 week later.

22 One thing we would ask your Honor is to renew our
23 request for a temporary restraining order barring -- pending
24 the Court's ruling on the longer-term preliminary relief, to
25 allow my clients to wear the wristbands at the Bow

1 extracurricular events that are coming up here in the next few
2 weeks before our briefs or right after our briefs are due and
3 until the PI decision, so it would be very temporary.

4 Defendants admit that they have banned the wristbands
5 because of their belief that they express anti-trans or
6 trans-exclusionary messages, but they allow trans-inclusionary
7 messages. That's viewpoint discrimination. There's really no
8 argument that it's not. Viewpoint discrimination is prohibited
9 in a limited public forum. We all agree this is a limited
10 public forum. There is no exception to that. Viewpoint
11 discrimination in a limited public forum is per se illegal.

12 And there's no evidence of disruption or harassment
13 here, especially in future events that are the ones that are
14 coming up, for example, the Bow's girl high school basketball
15 games that we mentioned and some of the other events,
16 especially because there is no evidence that there are any
17 trans players playing at those events. So, we would ask at
18 least for interim relief until this Court can craft what we
19 hope is a more longer-lasting remedy.

20 MR. SHIRLEY: We object. Taking the second issue
21 first in my mind, at least, your Honor, and this was what --
22 there's a vagueness problem just with the requested relief.
23 When they say "extracurricular activity," we've heard testimony
24 just now about a GSA club that meets at the school. That's an
25 extracurricular activity, too, and it is -- the concern we have

1 is to craft an order that would say "all extracurricular
2 activities." We don't want them then showing up at the school
3 door, I have an order that lets me into that GSA meeting so I
4 can wear my wristband and hold my sign. Obviously, I don't
5 think the Court is going in that direction, but that's one of
6 the objections we have to any type of order that says just
7 "extracurricular activity."

8 THE COURT: The extracurricular activity, that
9 extracurricular activity, as I understand the testimony, meets
10 within the school building.

11 MR. SHIRLEY: It does.

12 THE COURT: It is a much more controllable environment
13 than the limited public forum of an athletic event in a field.
14 I assume the basketball games are played in the gym.

15 MR. SHIRLEY: They are played in the gym.

16 THE COURT: Within the school building?

17 MR. SHIRLEY: That is correct. Yes. I was bringing
18 to your attention a vagueness problem, which, at least by the
19 way that they have proposed, their TRO they propose, they have
20 not withdrawn it, originally filed back in October was too
21 loosely written, in our position.

22 THE COURT: I'm not entirely clear -- I'm looking
23 forward to the briefings. I'm not entirely clear what Bow's
24 position actually is, because is it that, We prohibit the
25 display of those wristbands only on games when a trans player

1 is participating, or is it broader than that? Because there
2 was an event afterwards that it was no problem, or at least it
3 was allowed, it wasn't enforced.

4 MR. SHIRLEY: "Allowed," I don't believe that would be
5 -- obviously, we don't have a witness on the stand yet, but I
6 think I can proffer that "allowed" would not be how they would
7 characterize that. There was a very large population --

8 THE COURT: Suffered. They suffered it.

9 MR. SHIRLEY: They suffered it. They did not intend
10 to let that happen. It was a group, a large group of people.
11 It happened. It wasn't what they wanted to have happened.
12 They've been struggling with this issue for sure.

13 I think that their -- yeah. You're asking a question
14 like what is their position? And that's a very good question.
15 Certainly, looking backwards at what happened on the 17th,
16 we've heard testimony about the concerns.

17 THE COURT: That's all right. You don't have to go
18 into that.

19 MR. SHIRLEY: Right. Going forward, your Honor --

20 THE COURT: I hear what you're saying. We didn't
21 allow it; we just didn't take action.

22 MR. SHIRLEY: Right.

23 THE COURT: But what's your position with respect to
24 displaying this symbol? I understood it to be this case turns
25 on whether or not the School District was acting on a

1 reasonable basis to protect a child with respect to immutable
2 characteristics that it is obligated to protect a child from,
3 from injury or -- so you're not going to allow the wristbands.

4 MR. SHIRLEY: Today, backwards that's a large part of
5 how we explain what has happened. Parker and the presence of
6 Parker on that field, absolutely. Today forward we have now a
7 concern, and you heard that yesterday, when you were surprised
8 by Mr. Cullen's position. We do take the position because
9 we --

10 THE COURT: You were surprised by Mr. Cullen's
11 position?

12 MR. SHIRLEY: No, no. You were, sorry to say. You
13 were. I was a little bit, but anyway I wrote that brief, so we
14 were off each other's -- not on the same page there in terms of
15 the mootness question. What I'm getting at, your Honor --

16 THE COURT: Yes. I was surprised by Mr. Cullen's
17 position on mootness. Yes.

18 MR. SHIRLEY: What we're talking about, and this is
19 the reason for why his change of position, Mr. Cullen's,
20 yesterday, what I'm talking about right now to you is it would
21 be insincere of us not to tell the Court that, if they show up
22 at a basketball game, if they show up on the sidelines with
23 this wristband, with their signs, we have a problem, and we
24 have a problem with that because we were previously worried
25 about Parker Tirrell. We are now more generally worried about

1 the trans community at the school and what this message does
2 mean to them, and the way that this message is being received,
3 at least from the administrators, is transgender girls are not
4 allowed on those fields, they don't get to be what they should
5 be allowed to be, which is to be transgender girls and accepted
6 as such, and that's the message that they don't want to have
7 coming forward. And it is in the vein of the L.M. decision in
8 the sense that we can't quite know, necessarily, who's on the
9 sidelines. We actually don't even know who's necessarily going
10 to be on the field, because, although we did have notice of
11 Tirrell, Parker Tirrell being on that field, that's not
12 necessarily going to be the case going forward, we're not going
13 to know who's on the field, necessarily, is transgender or not,
14 and so it is an environment where the school just can't quite
15 know who's going to be harmed. They know it's a message that
16 they don't feel -- they've said inclusive, but we also feel
17 that it borders on a harassment -- it is a message that is
18 exclusionary on the basis of the sex of these transgender
19 students, and it is -- we already heard testimony today that
20 the original intent was to bring these signs to the sidelines,
21 but they had not planned ahead to have something to support the
22 signs on the sidelines, so they went on the cars. That was
23 testimony from yesterday.

24 One sign, we don't like it, ten signs, not great, a
25 hundred signs, a hundred wristbands, at what point does this

1 become -- that's the problem they're trying to wrestle with,
2 that's the problem they're wrestling with, and they don't know
3 -- I mean this Court, gracefully, thankfully, is weighing in,
4 because it is a hard question to answer, but they're worried
5 about it, and that's why they're taking the position they don't
6 want to have this happening.

7 MR. KOLDE: May I just be heard, briefly, your Honor?

8 THE COURT: Of course, of course.

9 MR. KOLDE: I want to be clear that we have alleged
10 only that we have a right to do this in a limited public forum.
11 Our view and the case law supports that a limited public forum
12 is a Bow School District event that is open to the public. We
13 are not requesting to show up to a GSA event that is open only
14 to students and staff that is not open to the public. Sporting
15 events are. The case law on this is well established. They
16 have not cited anything that stands for, that, properly read,
17 stands for a different conclusion. They have argued it's a
18 nonpublic forum. It's still the same test as a limited public
19 forum.

20 And, again, what Mr. Shirley just argued, very
21 heartfelt, and I understand that is the view of his clients, is
22 nevertheless textbook viewpoint discrimination. Legally this
23 case is not at all close. There is no viewpoint
24 discrimination --

25 THE COURT: It's very close.

1 MR. KOLDE: No.

2 THE COURT: I disagree.

3 MR. KOLDE: I understand, and you're the judge, but
4 this is my role as an advocate. You know, there's no viewpoint
5 discrimination in a limited public forum. In any event, we're
6 just talking about these public sporting events that are open
7 to the public. We are not asking to go on campus.

8 And I think just, you know, to wrap this up, your
9 Honor, I think the evidence is clear that Bow's position is
10 they can ban these XX wristbands at any Bow High School event
11 that is open to the public. It does not matter whether a trans
12 player is on the field, it does not matter whether they know
13 that a trans player is present in the audience or the
14 spectator's gallery. That's what they've argued in their
15 briefing.

16 THE COURT: You realize -- I know you know this,
17 because you're an astute scholar of these cases. You know what
18 he's doing is paraphrasing Chief Judge Barron's opinion in L.M.
19 It's not Mr. Shirley's words; he didn't just make those up.

20 MR. KOLDE: We don't think -- we don't think that --
21 we don't think that L.M. applies.

22 THE COURT: I know you don't, but nevertheless there
23 are cases out there that say that.

24 I'm going to take a minute just -- no. Motion for TRO
25 is denied. You have not shown, nor can you at this point show,

1 a likelihood of success on the merits warranting a TRO of the
2 breadth and scope that you've argued for.

3 I'm just going to take a minute. I don't usually do
4 this, and most judges probably don't.

5 Mr. Foote, Mr. Fellers, Mr. Rash, I want you to
6 understand I do understand your position. I'm afraid these
7 things tend to degenerate into good-guy/bad-guy stuff.

8 I don't see it as good-guy/bad-guy stuff. I
9 understand your position. You have a legitimate sociopolitical
10 position. You've articulated it. I understand that you
11 sincerely do not believe, and there is no reason you should,
12 that you weren't going there to target Parker Tirrell, or
13 embarrass her, or humiliate her, or drive her off the field or
14 anything like that, so the case doesn't turn on that. I
15 appreciated your testimony. I understand your position. You
16 do have a First Amendment right to hold that position.

17 However, they are not the bad guys either. They don't
18 have some secret cabal aimed at running around, denying
19 people's First Amendment rights. That's not what it's about.
20 They have an obligation to protect students and protect
21 students from harm, and that means harassment, targeting,
22 degradation, causing psychic harm, causing maybe even resultant
23 physical harm. That's what they're operating from.

24 So, I want everybody to understand that's not what
25 this case is about. It's not deciding who's a good guy, who's

1 a bad guy. It turns on whether or not the person operating the
2 limited public forum has the authority under the First
3 Amendment to restrict speech as they've restricted it. That
4 turns on what they could reasonably have thought the message
5 would be received as, okay, so it's not so much your subjective
6 intent in making the message, and that's what we're going to
7 decide. So, I don't want anybody leaving this feeling like it
8 was a won-loss on who's a bad guy, who's a good guy.

9 And I'm sure you didn't mind being called all those
10 nasty names, Mr. Fellers, because you're a First Amendment
11 absolutist.

12 Okay. So, we're going to get briefs on these issues.
13 It's legally nuanced. And, contrary to Mr. Kolde's view, my
14 view is it is not an easy case, it's a close case, it's a
15 nuanced case, and it's going to turn a lot on law that maybe in
16 six months is going to be overturned by the Supreme Court. Who
17 knows? So, let's everybody take it in that spirit, and I'll
18 decide it just as soon as I get briefs. Okay?

19 Thank you. Thank you. Appreciate it.

20 THE CLERK: All rise.

21 (WHEREUPON, the proceedings adjourned at 2:22 p.m.)
22
23
24
25

C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my knowledge, skill, ability and belief, a true and accurate transcription of the within proceedings.

Date: 12/2/24 /s/ Brenda K. Hancock
Brenda K. Hancock, RMR, CRR
Official Court Reporter